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The Conflict Between Foreign Policy and Civil Liberties Presented by the Use of Unmanned Predator Drones

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Abstract

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In this paper I will offer an overview the evolution of civil liberties in the United States. These liberties, I argue, were meant to protect individuals from unwarranted exercises of power from the government, but ultimately were not intended to hamper the government's ability to carry out basic government functions, such as self defense. Next, I examine the parallel evolution of the ability of the executive to exercise broad ranging powers in pursuit of foreign policy, especially in regard to self defense. After that I argue that the current policy not necessarily represent the administration choosing self defense over an individual's civil liberties. Rather, it represents the notion that at a fundamental level, a state will always choose to pursue foreign policies designed to protect itself, and that even the domestic legal institutions that have evolved in the United States recognize that fact.

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Recent news reports of a natural born expatriate American citizen targeted for assassination by the American government has resulted in a major argument over whether the government of the United States has the authority to undertake such actions. The targeting of an American citizen by his own government seems to contradict not just 200-plus years of American ideals, but also appears to fly in the face of recent Supreme Court decisions that uphold the civil liberties of U.S. citizens and detainees alike in the post-9/11 era. The fact that this action was undertaken by the current Democratic administration is all the more surprising, since many observers had assumed that it would pursue policies, if not diametrically opposite of the previous Republican administration, then at least more nuanced and reserved in their goals.

Yet the current administration's decisions and actions should not be surprising. In fact, the relative continuity in certain policies across administrations of differing political persuasions demonstrates the role that domestic institutions, especially legal institutions, can play in creating and perpetuating foreign policy. As I will demonstrate, the current controversy amply demonstrates that foreign policy is especially subject to institutional forces.

Over the course of the history of the United States, two separate but parallel legal traditions have developed that amply demonstrate both the paramount importance given to the rights and liberties of American citizens, and the near absolute ability of the executive branch to conduct foreign policy and safeguard the safety and security of the country. The collision of these two traditions is brought into stark relief by the Obama administration's recent attempts to justify the killing of an American citizen in a foreign country through the use of unmanned Predator drones. While the issue at hand raises

questions regarding the political wisdom of such actions, it also demonstrates that even the most liberal states in regard to the liberty and autonomy of their citizens are conditioned and act in ways that are intended to safeguard the safety of the country even at the expense of the their citizens.

In this paper I will first briefly review two competing explanations of state actions in the international system: realism and liberalism, using some recent works as examples of each. These theories offer competing explanations based on assumptions of the international system and where a state's core interests originate. Second, I will offer an overview the evolution of civil liberties in the United States. These liberties, I argue, were meant to protect individuals from unwarranted exercises of power from the government, but ultimately were not intended to hamper the government's ability to carry out basic government functions, such as self defense. Next, I will examine the parallel evolution of the ability of the executive to exercise broad ranging powers in pursuit of foreign policy, especially in regard to self defense. After that I will argue that the current decision to authorize the killing of an American citizen in a foreign country does not necessarily represent the administration choosing self defense over an individual's civil liberties. Rather, it represents the notion that at a fundamental level, a state will always choose to pursue foreign policies designed to protect itself, and that even the domestic legal institutions that have evolved in the United States recognize that fact.

FOREIGN POLICY

Examining the foreign policy of a state is a complex process and relies on one's notion of where a country develops its priorities. Many realists, for example, portray the

state as a single unitary actor whose primary characteristics are related to the space it occupies and the relative power it wields, with defensive realists admitting to small influences of certain domestic factors. Liberalism, on the other hand, can believe the state's foreign policy is a result of a morass of self-interested bureaucracies, or as the cumulative influence of various interest groups, or as the particular configuration of a leader's preferences. Regardless, liberal theories of foreign policy regard domestic factors as paramount in determining a state's actions and priorities.

Liberalism

In order to determine how states act in classical realism all that matters is the distribution of resources in the system and a state's placement in that system. Under such a conception the foreign policy of a state is almost a foregone conclusion. In order to protect itself a state must accumulate resources and deploy them in the state's best interest. All that is left for states and their leaders to do is to determine how to achieve this. Thus, Krasner can argue from his 'statist approach' that the state is relatively autonomous from society and can thus be treated as a homogenous rational actor. For Krasner the state is a relatively simple artifact, which dovetails nicely with a parsimonious realist theory of international relations. For policy making purposes, the state is reduced to the presidency and the State department which have a "higher degree of insulation from specific societal pressures and a set of formal and informal obligations that charge them with furthering the nation's general interest" (Krasner 1978, 11).

The problem with this is that not all states act as they should according to this notion of the state. If all that mattered was a state's particular configuration in the

system, then similar states in similar situations should make similar decisions, yet they often do not. Neoclassical, defensive and other strands of more recent lineage of realism thus contend that this theory is incomplete and therefore inaccurate. To account for these differences between state actions, some feel, one must take into account variables that make the states different, such as internal domestic arrangements or the idiosyncrasies of leaders.

Thomas Christensen, for example, sees a similar state to Krasner, in that the state determines what its goals are, generally independent of other groups (such as interest groups and political parties). The problem comes from implementing these goals. For Christensen the state is enmeshed in a web of social and political relations that make the state pursue a more hostile policy that it might otherwise prefer.

In this view the state is now caught between two systems, the international and the domestic. Yet, the state itself is still relatively simple and is able to determine independently its own goals, which are still related to its placement and survival in the international system, i.e., its security (chapter 2). The greater complexity comes from the more complex context of the state, rather from any greater complexity in the state itself. In order to examine its foreign policy decisions, what is necessary is something akin to a process tracing approach. The goals that the state is trying to achieve are there and determined by the appropriate officials, but cannot be independently executed.

Realism

Necessarily then, this foreign policy analysis becomes more complicated. Yet, this complexity is not the result of any inherent problems in determining what the state

should or is trying to do. This less parsimonious approach comes from recognizing the greater complexity of the situation that the state is in. Hence this variant of realism retains some of classical realism's simplicity because it retains a simple view of the state, and the goals that the state is trying to achieve.

For Fareed Zakaria, American national interests are still rooted at the systemic level. He notes that in "the anarchic, non-heirarchical international environment, states are driven by the system's competitive imperative" (Zakaria 1998, 29). But the straight forward implications of this classical interpretation of realism produces results that do not match the historical record (Zakaria 1998, 32). He corrects for this by making a distinction between national and state power. National power is the power that a state actually possesses as a result of its place in the international system. However, he notes that the power that a state can *actually exercise* is limited by the internal construction of a state's government and the extent to which a state (and its leaders) define their responsibilities and goals (p. 38-9). The state's leaders are thus simply engaged in an ongoing struggle with society to carry out the state's primary security related goals. Thus, much like Christensen argues, the foreign policy goals of the state are relatively easy to determine. The greater complexity lies in the context of the foreign policy making apparatus. Note that these simple views of the states and its foreign policy easily jibe with the realist tenet that security is the primary job of the state. Any loss in realism's parsimony comes from examining how these goals are implemented. This, however, is not the case with liberal notions of international relations.

Using realist theories to approach foreign policy and foreign policy decisions, while having varying degrees of parsimony, still does not result in a highly accurate

understanding of international relations. Treating the state as a single entity, at least for the purposes of determining state goals and national interests, results in contradictions over how states may change course in their interactions with other states. Liberal notions have stepped in to try and fill this void. Liberalism adds to our understanding of international relations and foreign policy by not assuming a simple set of security related goals for the state, but assumes that these goals themselves are fluid and subject to various influences. Thus, liberalism opens up the range of things to be examined by opening up the policy making process itself by adding such variables as preferences, institutions, bargaining, and structures to the mix. It does this, however, at the cost of simplicity. The increased complexity of the state, and, indeed, different notions of what the state does, can potentially give us a better understanding of how states conduct themselves. But by now using variable notions of what a state is, this approach may at the same time increase the risk of faulty analyses by examining inappropriate items.

In Jack Snyder's *Myths of Empire* we now encounter a state that is far more complex in its foreign policy decision-making. In this book Snyder examines the problem of over-expansion by examining which groups influence the foreign policy making process. Due to bargaining and log-rolling between groups that have an interest in a particular decision, states can sometimes engage in activity that exceeds what any single domestic group might wish to engage in.

Implicit in this examination of the influence of domestic actors on foreign policy is a very specific definition of the state. For Snyder, rather than being an entity that is struggling to carry out its systemically determined goals, the state is now a very weak entity. In fact, it barely seems to exist at all. Rather, government foreign policy

decisions seem to be merely the aggregation of self-interested groups, especially in the legislative setting.

One might argue that Snyder does indeed look at different institutional arrangements, as he posits that unitary, democratic and cartelized systems produce different foreign policy outcomes (Snyder 1991, 31-55). In fact, what he is doing is looking at how different institutional arrangements can blunt the foreign policy desires of conglomerations of interest groups. These institutional arrangements do not seem to participate actively in the policy process. It is the interest groups that are most heavily influencing the output. The government is more of an institutional arrangement that impedes to one degree or another how successful these groups are.

Snyder's assumptions of the state differ greatly from realist notions. We thus are examining two different outcomes, because there are two different inputs. For the realist the input is a set of predetermined goals that are achieved to varying degrees, while for the liberal the input is very much variable according to the desires of the dominant groups. Because of this we should then expect a wider array of outcomes (foreign policies) for this type of analysis.

In addition, there is now an added layer of complexity. Now the analyst must determine what goals a state is trying to achieve. For Snyder, these goals come from interest groups and are mediated by domestic structures (Interestingly, Snyder assumes a uniform reaction on the part of other states, that they seek to counter belligerent behavior. For the other states, their actions are determined by their need to ensure their survival!). Snyder's results are thus indicative of what we might expect from a liberal analysis of foreign policy. The results only explain certain types of behavior that he chose

beforehand (i.e. he selected on the dependant variable). In this case it is overexpansion, though it could be a number of different actions. Because we should expect different outcomes when goals are generated from different situations, this becomes less of a generalizable theory of foreign policy, and becomes rather an approach to analyzing foreign policy. Such an approach requires the analyst to select the best tools for any given situation, and there is no guarantee that the analyst will use the correct tools. Such analyses lend themselves to the case study method in order to ensure that the correct variables are examined and explained in differing cases. Thus we lose the simplicity of the realist approach while, perhaps gaining in accuracy.

The case covered by Graham Allison is perhaps the best example to demonstrate how the foreign policy a state implements is determined by the model of the state that is employed. The Cuban Missile Crisis fits the realist paradigm to an unparalleled extent. Here, regardless of the analytical tools used, one would expect to find a state acting in its national security interests, unfettered by outside concerns. Yet, the three models employed by Allison each point to different explanation for the same event. And in both the second and the third we find the options open to the leaders circumscribed by the organization of the state (Krasner's criticisms notwithstanding). His organizational model in particular speaks to this when Allison, after noting how leaders had been working on the crisis in the White House, asks "What, specifically, *could* be done?" (Allison 1999, 225, emphasis in the original).

For Narizny on the other hand, the leader acts as a broker of sorts between different interests in the state. Unlike Snyder's state, here the state, or at least the leaders in the state, plays some role in the foreign policy output. For Narizny, the broad strokes

will be determined by the dominant interest groups, but since there are now competing groups (for Snyder the only opposition seemed to come from a rather diffuse society, which is no match for the organized groups), a manager must try to accommodate the different groups. The leader will then try to reach an accommodation between the various interest groups.

The composition of the state again has a significant effect on the state's foreign policy. The assumption that there are four main groups, each with a different orientation towards the use of force and assertiveness, requires a state that can balance between these groups. This is contra-Snyder, where the state need not play such a determinative role, but rather seems to be more of a weathervane that points in the direction of the dominant groups. Here we see a stronger state, but one which has no particular orientation. It does not have a particular goal, like the realist state, but is merely functional in nature as it coordinates the power of the influential groups.

Again, for methodological purposes, this is far more complex than realist theories. Since the outcome depends not just on the context of the state, but also on how the goals are created and defined, the researcher must become far more involved in explaining a particular outcome. This then increases the chances that the explanation will be contingent on circumstances particular to that case.

Yet the relationship between domestic institutions and foreign policy may not be that complex. In fact, it may be possible to see how realist assumptions are reflected in domestic determinants of foreign policy. This is especially true in regard to the development of domestic legal structures that reflect realist assumptions regarding the needs of the state. It is the development of these structures that I will return to later.

CIVIL LIBERTIES

The evolution of the liberties of citizens of the United States has been a complex process. Originally, some of the authors of the Constitution did not want to include a bill of rights, fearing that any list of rights as written down in 1787 could be construed as the only rights the citizens would ever have. Many, including Alexander Hamilton, felt that the prescription of powers to the national government by the Constitution was guarantee enough of individual liberties:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? (Federalist # 84)

Hamilton and others had hoped that by not giving specific grants of powers to the government that this would be interpreted to mean that the government would not be able to engage in activities that are not specifically stated. Despite Hamilton's fears, a Bill of Rights was adopted, and the courts, especially in the 20th century, have shown a general trend towards expanding and protecting individual liberties.

For example, in the area of free speech, in the Supreme Court's first decision regarding the issue, the court concluded that First Amendment free speech rights do not protect all speech. Instead, the protections are dependent upon the context in which the speech is made. Any speech that interferes with the government's job to enforce laws or keep citizens safe is not protected. Thus, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

(Schenck v. U.S., 249 U.S. 47, 51). However, the corollary to this analysis is that any speech that does not present a "clear and present danger" is protected. What matters is the context and whether such speech inhibits the government from pursuing one of their constitutionally mandated duties:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. (Schenck v. U.S., 249 U.S. (1919) 47, 51)

In 1969 the courts would go even further in defining what speech is protected by claiming that the only speech not protected by the first amendment is that speech which is "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action" (Brandenberg v. Ohio, 395 U.S. (1969) 444, 447) (emphasis added). The immediacy of any speech to actions the government is supposed to regulate or prevent clearly indicates that the right of individuals to be free from unnecessary government interference is a paramount goal for the court.

Even during times of conflict and war, the courts have held that the government, and more specifically the executive branch, is bound to act within certain constraints. In Youngstown Sheet & Tube Co. v. Sawyer (343 U.S. 579 (1952)) the Supreme Court invalidated President Truman's seizure of domestic steel mills without an explicit grant of authority from Congress. President Truman believed that a strike by mill workers would have harmed the war effort in Korea, and took control of the mills from the private owners. The court, although divided in their reasoning, held in a 6-3 decision that even

his wide ranging authority as commander-in-chief did not authorize the President to take control of private resources within the United States. To do so would open the door to government intervention and regulation of all aspects of domestic life:

> That seems to be the logic of an argument tendered at our bar - that the President having, on his own responsibility, sent American troops abroad derives from that act "affirmative power" to seize the means of producing a supply of steel for them. To quote, "Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers." Thus, it is said, he has invested himself with "war powers."
>
> I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. *But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture*. Youngstown Sheet & Tube Co. v. Sawyer (343 U.S. 579, 642) emphasis added

The Supreme Court's reasoning reflects that of earlier decisions, that the citizen's of the United States are to be protected from unnecessary intrusion from the government, even in times of conflict.

More immediately connected to the 9/11 attacks, the subsequent military actions in Iraq and Afghanistan, and the more general 'war on terror,' the court has handed down decisions that likewise place restrictions on how the government may act, even in times of potential threats. In Hamdi v. Rumsfeld (542 U.S. 507 (2004)), the court ruled in the case of an American citizen, Yaser Esam Hamdi, who had been detained as an "illegal enemy combatant." In this case, Hamdi had been apprehended by Afghani forces and

turned over to American authorities, who designated him an illegal enemy combatant. As such, the Bush administration claimed that Congress had given the executive branch, and the President in particular, the power to declare even American citizens illegal enemy combatants. The administration claimed that the 2001 Authorization for Use of Military Force Act (AUMF) was a congressional authorization of power, allowing the President to "use all necessary and appropriate force" against those "nations, organizations, or persons" that had "planned, authorized, committed, or aided" the September 11 attacks in the United States. The administration claimed that, under the AUMF, individuals apprehended in the course of carrying out these powers were ineligible for the protections other citizens are automatically entitled to by the Constitution because to do so would, in effect, interfere with the government's ability to execute these powers. Thus, even citizens like Hamdi were not entitled to any legal considerations nor did they have the ability to challenge their detention in court through habeas corpus and other due process proceedings.

Hamdi claimed the opposite: that as a U.S. citizen, he could not be denied such rights. The Supreme Court agreed and ruled in 2004 that as an American citizen, Hamdi could not be denied his constitutional right to due process in challenging his detention. Though the justices disagreed in how far due process restricted the ability of the government to carry out it's duties, eight of the justices concluded that even under potentially threatening conditions the government still must respect the liberties of U.S. citizens.

While the court agreed that "There is no bar to this Nation's holding one of its own citizens as an enemy combatant" they believed that

> it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. (Hamdi v. Rumsfeld (542 U.S. 507, 532 (2004))

In order to prevent what the court termed "the risk of erroneous deprivation", the court thus concluded that the 2001 AUMF does not allow the President to detain indefinitely citizens, holding that "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker".

It is important to note that in reaching this conclusion, the court explicitly weighed the need of the government to prosecute a war without undue restraint against the right of a citizen who might be threatened by the power that the government could wield in carrying out its responsibilities. In finding that citizens could challenge their detention, the Supreme Court believed "it unlikely that this basic process will have the dire impact on the central functions of warmaking" that are inherent in the national government, and that

> while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator. (Hamdi v. Rumsfeld (542 U.S. 507, 536 (2004))

However, this case is also illustrative of the fact that the executive constantly seeks to expand their power, and reads laws and the Constitution in such a way as to justify such an expansion of power. Every President since George Washington has,

especially in the realm of foreign policy, claimed the power to conduct actions not specifically forbidden in the Constitution. Presidents thus claim they are justified through "the silences of the Constitution. He finds a general power to conduct foreign relations for the nation. Then he assumes that whatever had not been expressly assigned to Congress is to be exercised by the executive" (Pious 1979, 333). This process is reflected in the evolution of the legal powers of the executive to conduct foreign policy.

FOREIGN POLICY POWERS

Over the course of the history of the United States several legal institutions regarding the role of the President in foreign affairs have evolved that reflect the concerns that the framers of the Constitution had in regard to protecting the nation. There are several sources that Presidents have invoked in order to justify an expansive role of the executive.

The Constitution: Commander-in Chief

Although the framers of the Constitution desired to create a system where each branch would be able to 'check' the power of the other branches and 'balance' the power between them, the President's authority as Commander-in-Chief still contains a wide ranging grant of power to the President. The decision to go to war was left in the hands of the more representative branch because the framer's felt that war was such a weighty issue that the citizenry must be involved in the process, lest a situation as had happened in England should occur, where the Executive had the power to declare war and pay for it. Thus, in Federalist 69 Alexander Hamilton observes that power of the "British king extends to the declaring of war and to the raising and regulating of fleets and armies"

allowing one person or part of the government have the ability to plan and conduct war without consideration by the public. Hamilton goes on to point out that in the Constitution under consideration, this power would be divided, since the powers over war and the budget "would appertain to the legislature," while the ability to prosecute the war would be left with the President.

The framer's corrective to the potential abuse of power inherent in having a single person in charge of a nation's war-making abilities was not meant to curtail the government's ability to defend the country, however. Even at the time the framer's knew that in order to defend the country from surprise attacks, the ability to command a military on short notice was necessary. Even the noted Congressional scholar Louis Fisher, in arguing that framers desired an enhanced role of Congressional power over the executive in matters of war, observed that

> The one exception to this pattern of legislative control was the discretion left to the president to take certain defensive actions. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, because he expected Congress to meet but once a year. Madison and Elbridge Gerry moved to inset "declare" for "make," leaving the president with "the power to repel sudden attacks." Their motion carried. The duty to repel sudden attacks represented an emergency measure that permitted the president to take actions necessary to resist sudden attacks either against the mainland of the United States or against American troops abroad. (Fisher 2000, 9-10)

This belief that the leading role of the Commander-in-Chief is to protect the United States can trace its development over the course of the history of the United States in many different settings. Legally, the Supreme Court has noted in various permutations the idea that "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (Haig v. Agee, 453 U.S. 280, 307 (1981)) .

During his interview with David Frost, President Nixon articulated a belief that the President could in fact undertake actions that might in other circumstances be illegal, if these actions were meant to protect the country:

> FROST: Pulling some of our discussions together, as it were; speaking of the Presidency and in an interrogatory filed with the Church Committee, you stated, quote, "It's quite obvious that there are certain inherently government activities, which, if undertaken by the sovereign in protection of the interests of the nation's security are lawful, but which if undertaken by private persons, are not." What, at root, did you have in mind there?
>
> NIXON: Well, what I, at root I had in mind I think was perhaps much better stated by Lincoln during the War between the States. Lincoln said, and I think I can remember the quote almost exactly, he said, "Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation."

In this matter the Supreme Court had ruled earlier that, in pursuit of the defense of the country, the President was still required to act within the bounds of the Constitution, but despite this there could be times where national security concerns would trump the needs of justice. Thus, in admonishing the Nixon administration's withholding of documents from congressional investigations, the Supreme Court noted that

> *Absent a claim of need to protect military, diplomatic, or sensitive national security secrets*, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide. (U.S. v. Nixon, 418 U.S. 683, 706, emphasis added).

The very clear assumption that the phrase *"Absent a claim . . ."* rests upon is that the President indeed has special prerogatives in matters of national security. Though the Constitution itself is silent in what duties and responsibilities the title Commander in Chief encompasses (see Pious, 1979 for a discussion on the executive's use of the

"silences of the Constitution" to justify expanded powers) there is little doubt that the President is vested with the power to protect the country and its citizens.

The 'Sole Organ' Doctrine

The Sole Organ Doctrine of the executive maintains that through the President's responsibility to conduct foreign relations and be responsible for national security, the President may act with few active constraints by the legislative or judicial branches. The responsibility for these actions is found in Article II, section 2, where the framers wrote that the President " shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . ."

Thus, many scholars (and all Presidents) claim that the President has an 'inherent' exclusive power that derives from his position in the government. This doctrine has found a new life in the post 9/11 era as the White House has attempted to expand its authority in the national security arena. In the immediate aftermath of the 9/11 attacks, the Justice department wrote that

> We conclude that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States" (United States Department of Justice 2001).

Even a more limited reading of this doctrine again leaves the President with a large amount of discretionary power in regards to foreign relations and national security, and the trend has been towards a greater rather than lesser reading.

The origin of the phrase, and the idea behind it, are not new. It was first used by John Marshal in the House of Representatives in 1800 (Fisher 2007, 140). Its oft-referenced meaning can be found in the Supreme Court decision United States v. Curtiss-Wright (299 U.S. 304, 319 (1936)), where the Supreme Court outlined the near absolute power of the executive to conduct foreign affairs:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. (United States v. Curtiss-Wright 299 U.S. 304, 319)

Later, in recognizing the extent of the executive's power, the Supreme Court attempted to elucidate the intent of the framers when they wrote the Constitution and concluded that the framers had in fact modeled the American foreign policy apparatus on that of the British monarchy! In this case, the Supreme Court determined that in fact the President does possess 'plenary' powers to conduct foreign relations, and that the President was not dependent on a delegation of power from the legislature.

Further, the history of the legislative branch displayed, in the court's opinion, a regular pattern of deference to the executive in the conduct of foreign affairs. The court concluded that "The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice

found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb. " (United States v. Curtiss-Wright 299 U.S. 304, 329). For the court to say that they do not feel compelled to overturn such a well established practice, even if such a practice has 'far less support in principle than we think it does' is truly a monumental statement. The court, in essence, seems to be saying that the matter at hand, foreign relations, is far more important than constitutional principles, and that what has been shown to work during the history of the country should be given priority over those principles. Thus the trend has been towards a more expansive view of the President's power in foreign policy at the expense of the other branches of government.

The Constitution: Executive Powers and the Oath of Office

In addition to the specific grants of power given to the President as Commander-in-Chief and as chief foreign policy maker, it should also be recognized that the President is imbued with general executive authority to carry out actions in the interests of the United States. Indeed, the oath of office as specified in Article II, section 1, of the Constitution reads: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." The fact that the words 'protect' and 'defend' figure so prominently in the oath further gives weight to the notion that the President, in carrying out his duties as President, above and beyond all other duties, is to insure that the country's security is provided for.

United Nations Charter

In negotiating and executing treaties as part of the President's job, the President finds even further support in his duties to protect the country in Article 51 of the United Nations Charter. This portion of the U.N. Charter specifically gives counties that fall under attack the right to defend themselves:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

By noting that self-defense is an 'inherent' right, the United Nations Charter is specifically saying that counties are automatically justified in protecting themselves rather than relying on any outside justification, such as the charter itself. As one prominent scholar noted:

> Many writers have asserted that the use of *inherent* in Article 51 clearly establishes a right of states to use force in self-defense and that Article 51 does not imply an impairment of that right until the Security Council (or the General Assembly) has acted. Such a view, shared by the present writer, holds therefore that the right of self-defense is not at all based on the Charter but is a normal right of states under international law. (Von Glahn 1992, 131)(emphasis in original)

Since the President is responsible for carrying out treaties, and since the U.N. Charter specifies that states are justified in protecting themselves even without international agreement. The President can legitimately claim international justification for his actions as well as domestic Constitutional support. In effect, the international agreement says

that no international agreement is needed to defend oneself, giving the President the ability to defend the country without the need for international approval.

CONCERNS OVER CURRENT POLICY

The preceding discussion makes clear that the trend in both domestic and international practice is that self defense is a primary responsibility of a state, and that a country is to have wide latitude to defend itself and its citizens. There is, of course, the open question of what constitutes self-defense. Those who favor a limited executive might, for example, favor a reactive policy that limits the President to responding to the actions of others. In contrast, another perspective argues that a state can be more aggressive in its notion of self defense. This latter notion seems to fit better with the evolution of the legal and constitutional institutions around U.S. foreign policy. And it is this line of reasoning that the current administration is attempting to promulgate in its justification of the use of drones in foreign policy.

Presidents, as a matter of history, are not reactive. In fact, the form of government that the framers created in Philadelphia in 1787 is predicated on the belief that those who are in positions of power will not limit themselves, but rather will attempt to further expand their own abilities and those of their office. The discussion of how much power the President *should* have is a necessary one, but differs from the question currently under consideration, which is whether the President can claim to have the power to order the killing of an American citizen in the interests of national security.

The current policy as outlined by Harold Koh, the Legal Advisor of the Department of State, builds upon the existing framework of Presidential authority in

national security matters to make the claim that the President does indeed have such authority. In a speech to the Annual Meeting of the American Society of International Law on March 25, 2010, Harold Koh stated the administration's rationale behind the use of unmanned aerial vehicles - commonly referred to as drones - to attack those persons who are deemed a threat to the United States. The legality of the use of drones has been called into question by some who question the legality of using methods that may target individuals away from traditional battlefields. Should some of those individuals be American citizens, whether they are specifically targeted or not, be killed in such an attack, clearly an argument could be made that their rights had been violated by the American President while he was carrying out his duties as President.

More specifically, The American Civil Liberties Union filed a Freedom of Information Request with the U.S. Government seeking

> information about the legal basis in domestic, foreign, and international law for the use of drones to conduct targeted killings. We request information regarding the rules and standards that the Armed Forces and the CIA use to determine when and where these weapons may be used, the targets they may be used against, and the processes in place to decide whether their use is legally permissable in particular circumstances, especially in the face of anticipated civilian casualties. We also seek information about how these rules and standards are enforced. (American Civil Liberties Union 2010, 2)

The concerns of the A.C.L.U. are twofold: 1), they are concerned that the use of drones in targeted killings may produce heavy civilian casualties the United States is legally responsible to try and avoid; 2) the concern arises that targets that these drones are used against are not legitimate military targets but are illegitimate political targets, and that the United States is engaging in acts of political assassination. If one of these targets is an

American citizen, then clearly the concern is that if he is killed, it would have occurred extra-judicially, without the due process and other rights a citizen is entitled to.

Since then, reports have surfaced in the media that have added a third dimension to these concerns: a natural-born citizen of the United States, Anwar al-Awlaki, has been targeted for killing by the U.S. government. Although this had been a hypothetical possibility at the time that the A.C.L.U. made its request, the issue is now very real. The actions that the United States government is engaging in will deny a U.S. citizens of one of his civil liberties, specifically his right to 'due process' from the government whenever the government tries to deprive him of his life or liberty.

THE ADMINISTRATION'S JUSTIFICATION

The argument made by Harold Koh in March tried to address these two concerns directly. When combined with the general trend towards greater executive power, Koh's reasoning tries to give the President the power to order such killings. What is striking about this situation is that while the President, when acting in accordance with his duties to protect the country and its citizens, appears to have the unfettered and unilateral power to order the killing of an American citizen. However, should the President attempt to act against Anwar al-Awlaki in his capacity of executing the laws of the United States (i.e. pursuing criminal charges), then the President would still need to act in accordance with the due process rights that any American is entitled to.

In addressing these concerns, Harold Koh first referred to what he called "The Law of 9/11" which appears to be an appeal to the dangers that the United States faces after the 9/11 attacks. In differentiating between the pre- and post-September 11 eras,

the administration is trying to draw attention to current dangers that didn't exist (or at least we were unaware of) prior to the attacks:

> We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda). (Koh 2010)

From this Koh concludes that because of the ongoing hostilities that the nation faces, the President may take actions consonant with his responsibilities as Commander-in-Chief. Not only are such actions justifiable, they are required.

Interestingly the administration's first justification is not in the inherent power or constitutional duty of the President to safeguard the country. Instead, Koh first makes an appeal to international law, followed by domestic justifications:

> The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day. (Koh 2010)

In all likelihood, this is intentional. The primary justification for the use of force in international law is defensive in nature, to preserve a county's existence in the face of a hostile force. In the case of al-Qaeda and the Taliban, the use of force is neither being employed under the threat of the country being overrun by an equal force, nor is the territory of the United States and citizens under perpetual threat. The attacks of 9/11, as

horrific as they were, and subsequent attempts at terrorism have placed small parts of the population under threat of violence for comparatively limited amounts of time. Contrast this with the threat the British were under for years during World War II or the threat the U.S. might have been under has the Allies lost. Under the current situation, the overall threats might not rise to the level necessary for the United States or any other country to be justified in taking actions under international law.

While the administration starts with international law of self defense as a justification for its action, it is in the domestic realm where we can see the power of the presidency be exercised and expanded. In establishing the right of the United States to use force, Koh went beyond a reactive notion of self defense and asserted that "the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks" (Koh 2010). The structure of this sentence is important. Koh and the administration are arguing not only self defense. In addition to that, the administration is stating that we are in, if not an all out war, then something akin to it. The United States is not simply looking to defend itself and dissuade and prevent an attack on the United States, but instead is engaged in active combat with a foe intent on harming us.

Note that there is no discussion on whether al-Qauda or the Taliban could actually defeat the United States. If this assertion was made one would be tempted to ask 'How?'. Surely these groups cannot take over the country nor bring about its demise. Instead, what the administration is trying to do is commingle the justification for self defense and the justification to fight a more aggressive military campaign. Because of the comparatively limited threat posed by the county's enemies (WMDs notwithstanding)

self defense alone might not justify aggressive foreign policy and military actions. So the administration is trying to 'hitch' the rationale for a more aggressive posture onto the self defense justification. In the face of a perceived threat the executive claims more power than it might otherwise be allowed to have by the Constitution. Given the general deference shown by the courts in past instances, this is a sound strategy.

In essence, the administration is trying to elide over the justification for aggressive action by suggesting that we are in a conflict of self defense, which is allowed under international law. Then, the administration seeks to use the Authorization for the Use of Military Force (AUMF) from Congress, passed in the wake of the September 11 attacks, as justification for actions that go beyond reactionary defensive measures, but are taken for defensive purposes. Actions such as targeting individuals for killing would fall into this category. They are individuals who are undoubtedly trying to cause harm to American territory and citizens, but are not necessarily the threats envisioned to states under international law.

Because these individuals do represent threats of a kind that require direct action rather than defensive reactions, Koh continues by outlining not why such individuals should be targeted, since that is covered by earlier justifications, but *how* they will be targeted:

> Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

> First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack;
>
> and Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated. (Koh 2010)

It is interesting to note that this reasoning mirrors very closely the argument that Michael Walzer made in his seminal work *Just and Unjust Wars* (Walzer 1992*)*. In his view, noncombatants, while never legitimate targets, may be subject to what he calls the 'double effect': "Double effect is defensible, I want to argue, only when the two outcomes are a product of a double intention: first, that the "good" be achieved; second, that the foreseeable evil be reduced as far as possible" (Walzer 1992, 157). What he is saying is that in combat, states have an obligation to balance the good that will come from the military action against the probable or foreseeable negative effect it will have on non-combatants.

But this is very similar to Koh's metrics of distinction and proportionality. Under both standards, an attack on a 'low-value' target that imperils many noncombatants is, or should be, strictly prohibited. On the other hand, one could make an argument if the value of the target was high enough, then a more risky attack could be permissible. What is important to note is that in neither case is the question of the target addressed. By addressing only the concerns over whether noncombatant are put in unnecessary danger, the administration is trying to ignore the question of who is targeted. By focusing on the question of how to attack a target, the administration is trying to subsume the question of why attack a particular target into the President's war-making and foreign policy powers.

Because the administration has elided the self defense and justification of international law into the Executive prerogative to defend the country from harm, now the administration merely needs to acknowledge that in its military activities it is not violating any of the established restrictions on military action by abiding by provisions that limit, but do not stop, civilian losses. This can even include the assassination of an American citizen.

CONCLUSION

The strategy that the current administration has engaged in to justify the use of unmanned drone aircraft to assassinate key terrorist targets, potentially including an American citizen, is one that follows from the evolution of two key strands of American political institutions: the ability of the President to exercise near complete control of the country's foreign policy and war-making apparatus, and the development of individual liberties that put restraints on when and how the government can interfere in the lives of the citizens. Although these separate strands seem to be contradictory in certain circumstances, in fact, as I have demonstrated, they are not. The function of civil liberties is not to restrain the government unnecessarily, but to try and ensure that citizens are not unnecessarily abused by their government. Thus, in theory, even when a citizen poses a threat to the national security of the United States, the development of both the foreign policy and civil liberties legal institutions of the country can allow for the appropriate treatment of that particular situation.

I have argued that given the ever widening power of the executive in foreign policy and self defense matters, it is natural and to be expected that the government would make the claim that assassination of an American citizen is appropriate. The way the current administration has made that argument does not allow for examination of how

much of a threat a person, even a citizen, is to the country. An exploration of this question might lead on to conclude that such actions are not really necessary to ensure the security of the county. Rather, the administration has tried to answer the question, associated particularly strongly with unmanned aerial drone aircraft, of how best to accomplish such a task, and whether it can be done without 'unnecessarily' harming non-combatants. By answering that question, the government leaves the question of designating targets squarely in the purview of the President, which dovetails with the evolution of the President's foreign policy and war-making powers.

To students of international relations, this episode also is an interesting examination of competing theories. On the surface, this appears to be a case where different theories would lead one to different outcomes. In traditional realist thought, the outcome in this case would be obvious, that a state will do whatever is in its interests of self defense. Yet, parsimonious this explanation may be, it misses the nuanced evolution of the internal mechanisms of the American state. It would not be able to explain why, for example, the President can exercise wide ranging powers in foreign policy, yet still be constrained in how it deals with it's citizens in most circumstances.

A liberal analysis of the development of domestic political features, such a individual liberties, on the other hand, would capture this complexity, yet without an understanding of some of the main concerns of the founders, and of their concern over conflict between states. Analyzing only one institution might lead one to conclude that the United States has far less power over its citizens than, in fact, it does.

This case actually presents a situation where the best features of both liberal and realist theories can be introduced and usefully employed to understand the outcome. Through a careful understanding of the development of particular domestic institutions

and the application of certain realist assumptions of the international system, one can employ liberal modes of analysis and reach a realist outcome.

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This report was typed by the author.